



INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NONRULE POLICY DOCUMENT

Title: Access to Third Party Property

Identification Number: Document #0101, NPD # W0043

Date Originally Effective: October 19, 2000

Dates Revised: None

Other Policies Repealed or Amended: None

Brief Description of Subject Matter: This document will address off-site access issues when a spill or release from an underground storage tank may have migrated onto real property that is owned or operated by a person or entity that does not own or operate the site where the spill or release occurred.

Citations Affected: IC 13-23, P.L. 129-2000, 328 IAC 1-3-5

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty days after presentation to the appropriate board and after it is made available to public inspection and comment, pursuant to IC 13-14-1-11.5. If the nonrule policy is presented to more than one board, it will be effective thirty days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

Indiana Code 13-23 requires the owners or operators of underground storage tanks (USTs) to comply with specific regulations for investigating and remediating the release of petroleum or other regulated substances. When releases occur, the owners and operators ("responsible parties") have an obligation under IC 13-23-13 to investigate the extent of the release and to undertake corrective action. Frequently, by the time the release has been discovered, the contaminants have migrated off of the property where the USTs are located. In order to conduct a complete investigation and corrective action, the responsible party may have to secure access to areas where the contaminants may have migrated, even those areas that may not be controlled or owned by the responsible party.

P.L. 129-2000 requires IDEM to develop this nonrule policy document to address the following issues, which frequently arise when contamination has moved onto a third party's property:

- (1) The need for a responsible party to undertake a reasonable, good faith effort to obtain access to off-site property that may be impacted by a petroleum release or spill;

(2) When IDEM may issue an order granting a responsible party off-site access;

(3) IDEM's subsequent exercise of its enforcement discretion in pursuing an action against a responsible party for failing to determine the extent of off-site contamination; and

(4) When the Excess Liability Trust Fund (ELTF) may approve reimbursement of the costs of a responsible party's investigation and remediation efforts, including an initial site characterization and corrective action plan, when off-site contamination has not been fully delineated because of a lack of off-site access.

Reasonable, good faith efforts

If necessary to complete the investigation or to implement corrective action, the responsible party must make reasonable, good faith efforts to obtain access to an off-site property. Indications of reasonable, good faith efforts include:

(1) Requests for temporary license for the responsible party and its agents and contractors, to enter upon off-site property to perform, until completed, the necessary environmental investigation and remediation activities, shall consist of at least one verbal and one written attempt to obtain access. If more attempts are made, the responsible party should keep a record of those attempts.

(2) At a minimum, requests for access should include assurances that the property will be restored to its previous condition consistent with completion of the investigation or corrective action activities and that the responsible party shall use reasonable efforts to minimize disruption to use of the off-site property.

(3) Written requests for access, which contain overly broad release, indemnification or "hold harmless" language are not considered "good faith" efforts. Instead, "good faith" efforts include a responsible party's written commitment to be responsible for damages arising from the environmental investigation and remediation work performed by the responsible parties.

(4) Requests for access should ensure that all technical data collected during the investigation on the third party property will be provided to the third party, at the third party's request.

Issuance of Order

IDEM has the authority, under IC 13-23-13-12, to require an off-site property owner to grant IDEM access to any property where "a regulated substance may be present due to a release from an underground storage tank" for purposes of investigating or remediating a release. IDEM may issue an administrative order for this purpose to the unwilling off-site property owner. IDEM will use this authority when the responsible

party has made reasonable, good faith efforts to obtain access and one of the following conditions is present;

(1) The responsible party has been unable to obtain access to off-site property which IDEM has a reasonable belief has been impacted by a release from the responsible party's UST;

(2) IDEM and the responsible party have been unable to agree upon an alternative location for the investigatory or remedial work;

(3) There is no other reasonable investigation and/or remedial method available to address the off-site contamination, which does not require access; or

(4) There is an imminent threat to human health or the environment.

Enforcement Discretion

IDEM may use its enforcement discretion in determining whether to pursue enforcement against a responsible party who has been unable to comply with the requirements of IC 13-23 or any rules promulgated thereunder because of a failure to obtain the necessary off-site access. IDEM's policy is to forego enforcement against responsible parties whom, despite reasonable, good faith efforts (as defined above), are unable to obtain off-site access. IDEM will, however, bring an enforcement action if the responsible party fails to make reasonable, good faith efforts (as defined above) to obtain access or fails to explore reasonable investigation and remedial alternatives that do not require off-site access and, as a result, the investigation and corrective action cannot be completed in a timely fashion. If all of the following conditions are met, IDEM will not bring an enforcement action against the responsible party when:

(1) Reasonable, good faith efforts by the responsible party were made to obtain the necessary off-site access;

(2) The responsible party has proceeded with the investigation or corrective action to the extent reasonably possible;

(3) The responsible party has explored other reasonable options available for completion of the investigation and/or the corrective action despite the lack of off-site access; and,

(4) An administrative order has been issued granting the responsible party access to the off-site property and for a sufficient duration to allow the responsible party to complete the necessary investigation and/or remedial activities. If the responsible party fails to utilize the order to undertake the necessary investigation and/or remedial activities in a timely manner, then such an enforcement action may be pursued by IDEM against the responsible party.

Reimbursement from the Excess Liability Trust Fund (ELTF)

For purposes of ELTF reimbursement only, when a responsible party cannot complete an investigation/corrective action because of a failure to obtain access to the off-site areas, IDEM will consider a request to grant conditional approval of an Initial Site Characterization (ISC) or Corrective Action Plan (CAP) that includes only those areas for which access is obtained. The responsible party may be eligible for reimbursement under the following conditions:

- (1) The applicant meets all other eligibility requirements for reimbursement;
- (2) The responsible party has adequately characterized the facility and those areas to which it has access; and
- (3) The ISC and CAP are approved by IDEM.